

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: CenturyLink Sales
Practices and Securities
Litigation

)
) File No. 17-MD-2795
) (MJD/KMM)
)

) Minneapolis, Minnesota
) August 17, 2020
) 9:03 a.m.
)

Benjamin Craig, et al.,
Plaintiffs,

)
) File No. 18-CV-296
) (MJD/KMM)
)

vs.

) Minneapolis, Minnesota
) August 17, 2020
) 9:03 a.m.
)

CenturyLink, Inc., et al.,
Defendants.

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BEFORE THE HONORABLE KATHERINE M. MENENDEZ
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

(MOTIONS HEARING)

Proceedings reported by court reporter; transcript
produced by computer.

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P R O C E E D I N G S

IN OPEN COURT

(VIA ZOOM)

THE COURT: All right. I have now magically appeared on your screen, so that's the pandemic version of "All Rise," but you don't have to do that.

We are here for a hearing about subpoenas that have been issued to third parties in this case. Let's go ahead and get appearances on the record. First counsel who is going to argue on behalf of the plaintiffs, and if you could also indicate who else from your extended team is present on the call to the best of your knowledge.

MR. BLATCHLEY: Hi, Judge. It's Mike Blatchley from Bernstein Litowitz on behalf of plaintiffs. I'll be arguing for our side today. And please don't hold me to this, but I believe from plaintiffs' side you have Rich Gluck from my firm, Lydia Anderson-Dana from the Stoll Berne firm, and Gregg Fishbein from the Lockridge Grindal firm.

THE COURT: Excellent. Thank you very much. And we've been trying to take notes as people chimed in, so hopefully we will be able to make a pretty good record of who attended the hearing. But thank you very much.

And how about on behalf of the defendants today?

MR. GIBBS: Good morning, Your Honor. This is Patrick Gibbs from Cooley. I'll be arguing for the

1 defendants. And also on the line from our side today are
2 Ryan Blair, Sarah Lightdale, and Bryan Koch from Cooley, as
3 well as Bill McNab and Tom Boyd from the Winthrop Weinstine
4 firm.

5 THE COURT: All right. Okay. Thank you all very
6 much.

7 If at any time you can't hear me, please let me
8 know. We have a court reporter. We are making an official
9 transcript. No other recordings, either audio or video, are
10 permitted from today's proceeding. Our court reporter will
11 be making the official record and that will be available, if
12 necessary, down the road.

13 I should also say that if we have any technical
14 difficulties, which are hopefully not going to thwart our
15 efforts, everybody should just sit tight and will receive an
16 e-mail communication from my chambers about how to get back
17 on the hearing. Hopefully that won't occur, but it just
18 seems best to have a plan in place. So check your primary
19 e-mails if something happens and our connections collapse
20 and we will make a Plan B right away.

21 Why don't we jump right in. I have a lot of
22 questions for everyone, but why don't we go ahead and start
23 with the defendants. Mr. Gibbs, you can go first. Tell
24 me -- I think I'll give you about 15 minutes, although if
25 you've met me, you know I will soak up a fair amount of that

1 with questions. But why don't you jump right in.

2 MR. GIBBS: Thank you, Your Honor. We have moved
3 for a protective order as to two different subpoenas that
4 the plaintiffs have served, sets of subpoenas, one on a set
5 of debt collection companies that work with CenturyLink and
6 one on a survey management company called Great Place to
7 Work.

8 In order to set the background for that motion,
9 though, I think it's important to keep in mind how much
10 discovery plaintiffs have already received. And we've had a
11 bit of a recurring theme on this subject on these calls, but
12 I think it's important to keep in mind what they already
13 have for several reasons.

14 So at this point CenturyLink has produced nearly
15 310,000 separate documents. The total pages exceed
16 2 million pages. We've spent over 40,000 reviewer hours.
17 Plaintiffs at this point have already issued 19 other
18 third-party subpoenas. So these 11 subpoenas to the debt
19 collectors and the survey management company come on top of
20 all of that discovery and, frankly, at some point --

21 THE COURT: You mentioned --

22 (Simultaneous indiscernible crosstalk)

23 THE COURT: I'm sorry to interrupt. But you
24 mentioned 19 other third-party subpoenas. What are -- what
25 categories of third-party subpoenas are there and has there

1 been any opposition, that you're aware of, either by you or
2 by the various custodians of those third parties?

3 MR. GIBBS: The categories that I'm aware of, Your
4 Honor, would include the company's outside independent audit
5 firm, KPMG; Ernst & Young, which has performed some
6 outsourced internal audit functions for the company; certain
7 public relations firms that have worked with the company in
8 connection with all of this; and I believe a significant
9 number of call center vendors.

10 So a lot of the company's sales activity takes
11 place by telephone and they performed some of that work by
12 contracting with third-party call center vendors, who do the
13 work for them.

14 And so, for example, we are currently figuring out
15 how to digest and review and deal with thousands and
16 thousands and thousands of call recordings, individual
17 customer call recordings that the plaintiffs have obtained
18 and now that we have from these third-party vendors.

19 So those are the categories. I'm not aware of
20 anyone having lodged any formal opposition, like a motion
21 for a protective order or anything like that. There
22 certainly has been some degree of negotiation. There have
23 been some instances where the third parties have documents
24 that CenturyLink has an attorney-client privilege or work
25 product claim over or some other, you know, privacy or

1 business concerns. So there have been the usual
2 negotiations, but nobody, to my knowledge, has actually
3 sought a protective order or simply refused to comply with
4 the subpoenas.

5 THE COURT: Okay. Thank you. That's helpful.

6 MR. GIBBS: So, Your Honor, my only -- well, there
7 are a couple points that I think should be drawn from the
8 size of the discovery record at this point in time.

9 First of all, I think it's important to keep in
10 mind what the plaintiffs are claiming here. The plaintiffs
11 here are not setting out to prove thousands and thousands of
12 individual customer complaints. What they're trying to
13 prove here is a securities fraud claim, and the securities
14 fraud claim that they have framed up in their Complaint is
15 one that claims that the company systematically, routinely,
16 at the direction of senior management, billed customers for
17 products and services they did not order. Plaintiffs have
18 claimed that this business practice was so routinized, so
19 systematic that it amounted to CenturyLink's business plan
20 for a multi-year period.

21 The plaintiffs have hundreds of thousands of
22 documents from the files of the individuals who allegedly
23 oversaw this scheme. They have hundreds of thousands of
24 pages of documents from the people who reported to them.
25 They have hundreds of thousands of pages of documents from

1 people who report to the people that report to them. They
2 have an enormous record of documents and internal
3 communications from CenturyLink.

4 And I think point one is if there was anything
5 like the type of scheme that the plaintiffs claim went on
6 here for many, many years and would have affected millions
7 of customers and would have necessarily involved hundreds of
8 people at the company, they would by necessity have ample
9 evidence of that type of scheme from the evidence they have
10 already gathered from the company.

11 And more to the point today, they would also have,
12 if any such thing existed, some evidence, some reason to
13 believe that these 11 subpoena recipients actually have or
14 are likely to have some meaningful evidence relating to this
15 case. And I think the opposition lays bare that they do
16 not. There's no indication. From this enormous discovery
17 record, they've come up with a handful of documents, only
18 one of which --

19 THE COURT: To interrupt, Mr. Gibbs, I have never
20 really seen an opposition to a subpoena arguing the ultimate
21 merits of the case, which isn't really the position you took
22 in your opening memorandum, but it's pretty much the
23 position you took in the beginning of your reply memorandum,
24 that they should not get this discovery because in your
25 opinion what they have already doesn't prove their case.

1 And I'm not sure that I found any authority for the idea
2 that that's a basis to deny additional discovery.

3 And I'm speaking abstractly here, but it could be
4 were the plaintiffs' claims true, that they need to look to
5 outside sources because the defendants haven't provided
6 discovery that documents their claim. That doesn't mean
7 their claim has no merit.

8 It feels like what we should focus on here is
9 whether this discovery is redundant of discovery that's
10 already been provided, duplicative of discovery that's
11 already been provided, or whether it's possible that there
12 are things in the possession of these third parties that are
13 relevant for this litigation but have not yet been
14 discovered. Rather than your argument that because we think
15 we're winning so far, they get no more discovery.

16 MR. GIBBS: That's fine, Your Honor. That wasn't
17 the argument I was trying to make right now. The argument
18 I'm trying to focus on right now goes to, I think, the third
19 of your three points, which is there's nothing in the record
20 before the Court right now that I think supports the
21 inference that these third parties have or are likely to
22 have any meaningful, actually relevant evidence. There are,
23 I think, other reasons why the state of the record supports
24 some of those other arguments, but this is what I was
25 focusing on right now and so let me get to that.

1 So, you know, as to the debt collectors, the
2 plaintiffs have submitted a handful of documents, some of
3 which touch on the notion of debt collection, none of which
4 suggests that any of these debt collectors are likely to
5 have any information that bears on the ultimate question in
6 this case, even indirectly, even secondarily, tertiarily,
7 about this management-led, top-down scheme to inflate the
8 company's revenue through fraud.

9 They've shown you, you know, two customer-related
10 exchanges, one of which doesn't actually deal with the debt
11 collector's work, both of which show management quickly
12 turning over a customer complaint for resolution and the
13 complaint getting resolved. None of them suggest the debt
14 collectors are likely to have information that bears on this
15 massive alleged fraud.

16 I know you probably think I am getting into the
17 merits there, but I still think if the documents we have so
18 far don't indicate that the debt collectors had any
19 involvement in the big fraud, I think that's relevant.
20 That's what they're supposed to be looking for here.

21 THE COURT: What if the debt collectors are
22 hearing from customers we're not going to pay this debt, you
23 know, we told the company that we weren't going to pay this
24 debt because we never requested these services and they were
25 artificially applied to our bill? How is that not evidence

1 of a scheme to cram?

2 MR. GIBBS: I think it is at best, at best
3 tangentially relevant. It is so far removed. You know, a
4 single customer saying I don't believe I ordered this
5 product -- and we have dozens and dozens of examples where
6 customers said that and they were wrong. So a single
7 customer making that claim in a debt collection process is
8 like 50 analytical steps removed from --

9 THE COURT: What if it's a thousand customers? We
10 don't know the scope of this discovery because we haven't
11 gotten to what the plaintiffs call kind of the
12 meet-and-confer stage. What if it's thousands of customers
13 who -- you say a single customer. I'm speculating wildly in
14 the other direction. What if it's a lot of customers who
15 consistently say we're not going to pay this debt, we told
16 them we weren't going to pay this debt because we don't owe
17 it?

18 MR. GIBBS: So there I would say a few things.
19 First of all, the company does business with or interacts
20 with tens of millions of customers and potential customers
21 in any given year. So it would need to be an enormous
22 number to be even remotely indicative of anything like what
23 the plaintiffs are claiming.

24 But more to the point, that's where I think you
25 get into redundancy. We have scoured this company. We have

1 searched through e-mails. We searched through databases.

2 We have run some of the broadest search terms I've ever seen
3 looking for individual customer complaints to the company.

4 I think there is zero reason to believe that there
5 is some massive set of consumers who complained to the debt
6 collectors that they were charged for services they didn't
7 buy, but who don't show up anywhere in this massive
8 production that we have made looking for any and every
9 individual customer complaint we can find. I don't think
10 those individual customer complaints prove anything. I
11 think the plaintiffs should be looking from the top down
12 because that's what their claim is based on.

13 But we haven't objected to a massive amount of
14 individual customer complaint focused discovery aimed at
15 CenturyLink and we have turned that stuff over. They have
16 thousands of pages, probably hundreds of thousands of pages
17 that touch in some way or another on some kind of customer
18 complaint or another.

19 If that's not enough for them to prove their case
20 or, again, to at least show some meaningful connection, not
21 just speculation that because debt collection might involve
22 people who don't think they owe the money and therefore the
23 communications with the debt collectors might show someone
24 saying they don't owe the money because they claim they
25 didn't order the service, and it might be big enough that it

1 might be somehow tangentially indicative of this supposedly
2 management-led fraud, I don't think that's enough. At this
3 point it is sheer speculation. There's no reason to believe
4 there's any evidence there that isn't totally cumulative of
5 evidence they already have from the company.

6 THE COURT: So your point is that even if it's
7 true that individual -- or one of your points, I don't mean
8 to suggest you have only one point, but your point on this
9 would be that even if it's true that individuals might have
10 complained to the debt collectors, that those individuals
11 would almost for sure have first complained to the
12 defendants before it even went to collections and therefore
13 an echo chamber of additional complaints from the same
14 people doesn't add anything to the litigation?

15 MR. GIBBS: Yes.

16 THE COURT: Okay. Let me talk for a minute about
17 the Great Place to Work survey or the employee satisfaction
18 survey company. Have you provided discovery related to
19 these -- tell me a little bit first about what you think --
20 tell me a little bit about the relationship that you're
21 aware of between the defendants and this company. What was
22 the nature of the survey work they were retained to do?

23 MR. GIBBS: Sure. The company comes in and -- the
24 survey company comes in and oversees a process of surveying
25 employees to find out what they think about working at the

1 company and then the survey company takes that raw data,
2 which goes straight to the survey company as far as I know,
3 they compile it. They sometimes issue reports on certain
4 companies that, you know, get very positive feedback from
5 employees. But they also then take at least some amount of
6 the raw data, the survey responses that they received, and
7 they send it back to the company whose employees were being
8 surveyed, so CenturyLink in this case.

9 And so as I understand the process, Great Places
10 to Work comes in. They administer a survey that goes out to
11 some selection of CenturyLink employees. The employees fill
12 out the survey anonymously. Great Places to Work collects
13 that data. They review it. They reach certain conclusions
14 and judgments. They send at least the raw data back to the
15 company. That's why those raw responses that plaintiffs
16 submitted in support of their opposition are in the record.
17 They got those from us.

18 And so as to Great Places to Work, I think it's a
19 slightly different issue. The issue is, first of all, I
20 don't know of any reason to suspect that Great Places to
21 Work has got any relevant information that would not be
22 included in the survey response data, which they already
23 sent back to CenturyLink and we've already produced to the
24 plaintiffs directly. That's point one.

25 Point two is this information is of marginal

1 relevance at best. You know, we've pointed out in the reply
2 that the excerpts that plaintiffs have submitted to Your
3 Honor don't actually reflect the full documents that those
4 excerpts are pulled from, and there may be space reasons or
5 whatever for that.

6 But the fact is CenturyLink gets back thousands
7 and thousands of anonymized responses to these very general
8 questions. Plaintiffs have scoured those thousands and
9 thousands and thousands of survey responses and they have
10 found what I think is reflected in the documents as a
11 handful of stray references to quotas and cramming and the
12 like. We have no idea who these people are. As far as I
13 know, there's no way to find out who they are. There's no
14 way to substantiate those claims.

15 THE COURT: Let's imagine that these people were
16 consistently saying, yes, there was a scheme from the very
17 top for us to engage in, you know, padding bills and
18 cramming services. I mean, we can -- even if they are
19 anonymized and even if they're not identified, that's
20 certainly evidence that's material to the conversation.

21 I think the bigger question is is Great Place to
22 Work sitting on information that hasn't been provided
23 already, and I'm having a hard time imagining that Great
24 Place to Work wouldn't have just turned all the information
25 over to defendants because that's what they do.

1 So are you aware of how much information they
2 returned to your clients and how much they may not have
3 returned in the interest of just giving a sampling, or did
4 they give all of their responses? What's your understanding
5 of what that might be?

6 MR. GIBBS: As far as I know, they just turned the
7 responses over to us. That's what appears from the record.
8 I'm not aware of any sort of distinction they draw between
9 here are the responses we're going to give you, but we are
10 going to keep all these other responses.

11 I don't think there's any reason to believe there
12 are individual employee responses that are not included in
13 the data that was provided back to the company and therefore
14 was searched and produced to the plaintiffs.

15 THE COURT: Okay. I've got one more set of
16 questions for you and then I think I want to hear from
17 opposing counsel.

18 One of the aspects of the survey subpoena is a
19 question about their response to the state AG -- two state
20 AG investigations, Arizona and Minnesota. It's Question
21 No. 4 on the Great Place to Work subpoena, if I'm recalling
22 correctly. Tell me what your thoughts are about that.

23 MR. GIBBS: Well, you know, we've noted in the
24 briefing that that amounts to a form of cloned discovery in
25 our view. I'm not aware of any particular reason to believe

1 that Great Places to Work has provided any documents to
2 government entities. As you know, we tried to take some
3 discovery into plaintiffs' interactions with some of these
4 state AGs, but were told it wasn't relevant and so we don't
5 know. So I don't know why the plaintiffs are asking about
6 this because I'm not aware of any reason to think that Great
7 Places to Work has submitted anything to any government
8 agencies.

9 THE COURT: Okay. Thank you. I'm sure I'll come
10 back to you in a few minutes, but is there any sort of last
11 points you would like to make before I pivot to
12 Mr. Blatchley?

13 MR. GIBBS: Well, just circling back to the
14 employee point, just as we did with the customer complaint,
15 we have run very, very broad search terms looking for
16 employees complaining internally about precisely these
17 issues. And so, again, to the extent that those employees
18 were complaining about that, I don't know why Great Places
19 to Work would have information that would not be duplicative
20 of what we've already searched for inside the company.

21 THE COURT: Does Great Places to Work do any
22 analytical work as well as sort of collecting data? Do they
23 write summary reports saying here's overall what we found
24 about how your employees feel, here are strengths, here are
25 weaknesses?

1 MR. GIBBS: I'm not aware of something that's
2 created and provided to the company that wouldn't be picked
3 up by our existing searches. I know that Great Places to
4 Work publishes lists in *Fortune* and other magazines. I'm
5 not aware of some unpublished analytical work that they are
6 holding on to that wouldn't have been provided to
7 CenturyLink. I'm just not aware of any such thing.

8 And there, you know, we would no longer even be
9 talking about feedback directly from CenturyLink employees.
10 We would be talking about conclusions that are drawn by
11 people at Great Places to Work who don't know anything about
12 CenturyLink other than what's in the raw survey responses.
13 So on a scale of relevance, that would strike me as many,
14 many levels removed from the question of what's actually
15 happening at the company. But I'm not --

16 THE COURT: Based on those reports --

17 MR. GIBBS: -- aware of any.

18 THE COURT: Okay. I was going to say if those
19 reports exist and if they reference anything about cramming,
20 presumably it's your position you would have turned them
21 over? I guess those reports would have been provided to the
22 defendants, which, frankly, I can't really imagine Great
23 Places to Work doing internal audits and not providing it to
24 the defendant. So your point is that if those exist, they
25 would have been turned over?

1 MR. GIBBS: Yes. And also, if they were created
2 but never turned over to the company, I'm not sure what they
3 even speak to. It wouldn't speak to what the executives at
4 CenturyLink know or believe about what's happening at the
5 company. If it was turned over to the company, it's been
6 searched. It surely would have been picked up by the search
7 terms we used and the plaintiffs would have it.

8 THE COURT: Okay. Thank you.

9 All right. Mr. Blatchley, let's hear from you.

10 MR. BLATCHLEY: Thank you, Judge. Can you hear
11 me?

12 THE COURT: Yeah.

13 MR. BLATCHLEY: Again, Mike Blatchley from
14 Bernstein Litowitz. I think probably what I'll do, if it's
15 most efficient, is kind of go through Mr. Gibbs' arguments
16 and I can give you my reaction to those.

17 The first point Mr. Gibbs made, and he has made it
18 repeatedly, is about the amount of discovery that's already
19 been had in party discovery. I just want to disabuse the
20 Court of the notion that this is somehow extraordinary in
21 this case. It is not. Just as -- the subpoenas that
22 plaintiffs served on the collection agencies and the other
23 third party, Great Place to Work, these are routine,
24 run-of-the-mill third-party subpoenas.

25 And the motion that you see from Mr. Gibbs and

1 defendants here is seeking to cut off the ordinary
2 meet-and-confer process, which would enable us to, I think,
3 get to actual facts about what your questions to Mr. Gibbs
4 were centered on, to actually talk to the third parties,
5 which we have done successfully with over a dozen other
6 third parties in this case to date, none of which have
7 sought to file a motion for a protective order or anything
8 coming close to that and which have been very cooperative in
9 discovery, as we have tried with every subpoena we've ever
10 issued, to be cooperative and considerate of third parties'
11 circumstances, as we are here.

12 What you have from defendants is to us somewhat of
13 a shocking and very kind of aggressive move to prohibit what
14 on its face, Your Honor, seems to us to be entirely relevant
15 discovery. We're talking about --

16 THE COURT: I think one of the concerns is less
17 about -- one of my concerns, I shouldn't try to cabin
18 Mr. Gibbs' concerns to match my own, but one of my concerns
19 is the reality that we are getting to duplicative discovery
20 here, that we are getting to some profound redundancies.

21 Let me use an example. I don't understand how
22 internal communications, which are contemplated in the
23 collection agency subpoenas, their own internal
24 communications about, quote, billing issues could possibly
25 be relevant.

1 And to the extent that it has any universe of
2 relevance, how is it not overwhelmingly likely to be
3 redundant of the customer complaints that should be
4 voluminous, per your theory, in the hands of the defendants
5 themselves?

6 MR. BLATCHLEY: Two points, Your Honor. First, I
7 think that we're talking about an entirely separate
8 universe, and I think the late fee example is one of the
9 examples that we provided in our briefs.

10 We are talking about interactions with CenturyLink
11 customers that the collection agencies uniquely have and
12 that are not shared by the company. So that's point one.
13 They are a unique set of documents we are confident exist
14 that do not -- have not been shared with CenturyLink.

15 And, second of all, they are just as relevant to
16 our obligation to prove that the defendants' statements were
17 false. If, Your Honor, as you suggested in your questions
18 to Mr. Gibbs, they show that the collection agencies are
19 getting, you know, loads of consumer debts that they cannot
20 collect because customers are saying that we were improperly
21 charged, the quantification and extent to those improper
22 charges are clearly relevant to our case.

23 Just as our expert is going to look at the
24 internal information that we are able to get from
25 CenturyLink's productions, those experts will also be

1 looking at the evidence from third parties.

2 We have a company that consistently uses third
3 parties to conduct its billing operations and its sales
4 operations. We had to go out and subpoena multiple call
5 centers that were basically --

6 THE COURT: I'm going to push back here. There's
7 a difference between front-end sales operations, which
8 arguably are going to be the front line of the cramming
9 problem, and the collection of unpaid debts, which, as you
10 know, would already go through some significant internal
11 complaint process and trying to get payment before it's
12 kicked to a collection agency.

13 What I don't -- what I can't really relate to is
14 how customers complaining to a collection agency about a
15 bill that they dispute isn't almost guaranteed to be
16 redundant of the same customers complaining to defendants
17 about their cable that they dispute ever having asked for.

18 MR. BLATCHLEY: Your Honor, I'm not sure I follow
19 the logic in that. They are going to be unique
20 communications with a collection agency that are not shared
21 by CenturyLink. I think that that's a reasonable --

22 THE COURT: Why wouldn't they be shared to
23 CenturyLink? If CenturyLink is trying to get these
24 collection agencies to collect dud or, you know, false
25 bills, why wouldn't the collection agency have shared that

1 communication to CenturyLink?

2 MR. BLATCHLEY: Your Honor, from the record that
3 we've seen to date, that doesn't -- it strongly suggests
4 that that is not, in fact, the case. Obviously the debt
5 collectors are going to have some of those first call
6 conversations. We know that CenturyLink deleted call
7 recordings after the first 45 days of having them, as we
8 allege in the Complaint, as a business proposition. So that
9 evidence is not there. We believe the collection agencies
10 might have obviously different phone calls and different
11 interactions.

12 All of that goes to showing the falsity of
13 defendants' statements. Again, I think Mr. Gibbs has been
14 focused on the mental state of the defendants, but obviously
15 that is a separate element that we are also required to
16 prove.

17 The fact that the collection agencies -- it's
18 going to be undeniably true that there are going to be
19 separate communications that the debt collection agencies
20 had with the customers.

21 It is also going to be true that these collection
22 agencies, which don't always just work for CenturyLink, but
23 others as well, will have discussions about the quality of
24 the debts that they are receiving from CenturyLink.

25 We also know that they have different processes in

1 place. Some collection agencies do one step of the
2 collection process. Some do a later stage, as Your Honor is
3 referencing. But even the first call kind of issues that
4 you are talking about, those go to collection agencies in
5 many instances. That's what we've seen in the documents.

6 You're suggesting that the complaints go to
7 CenturyLink first. We have a document that we submitted to
8 Your Honor that shows that the collection agencies actually
9 called and represented themselves to be CenturyLink to
10 customers. Now, those interactions from a customer
11 standpoint are going to be like I am talking to CenturyLink.
12 That's --

13 THE COURT: Let me make sure I understand the
14 timing. I get my CenturyLink bill. It has a whole bunch of
15 things I didn't ask for, hypothetically speaking. I call
16 CenturyLink and say I didn't ask for any of this stuff.
17 You're telling me that that call does not go to CenturyLink,
18 it goes to one of these third parties?

19 MR. BLATCHLEY: Your Honor, we're still trying to
20 get to the bottom of that, but it appears to be that about
21 10 to 20 percent, at least that's the document that we
22 submitted in the records to Your Honor that's I think
23 Exhibit C, shows that certain initial calls concerning
24 collections were carried out by the third-party collection
25 agencies. Again --

1 THE COURT: But that's collections and I'm not
2 really talking about collections here.

3 MR. BLATCHLEY: Yes.

4 THE COURT: I'm talking about billing disputes.

5 MR. BLATCHLEY: I'm sorry, Your Honor. On
6 Exhibit C they say incoming calls to CenturyLink are routed
7 to the collection agencies, certain of the collection
8 agencies. That was the one point I wanted to clarify for
9 you.

10 THE COURT: Okay.

11 MR. BLATCHLEY: So we think they are undeniably
12 involved in that process on some level and will therefore
13 have kind of unique information about improper charges.

14 And to the extent, Your Honor, that there is a
15 concern about, listen, you should get those documents from
16 the defendants themselves, that is something that's supposed
17 to be worked out and hashed out with the third parties, who
18 can tell us the same thing. They can tell us we don't have
19 unique documents, everything that we said we forwarded to
20 CenturyLink. We can have that conversation and deal with it
21 at the appropriate time.

22 It's not -- it doesn't make sense to do that
23 without the actual facts, without -- Your Honor asked
24 Mr. Gibbs a series of questions about what if they have
25 documents showing that there was a significant number of

1 bills that were improperly charged. We don't know the
2 answers to that, Your Honor, because we haven't had the
3 opportunity to go through the meet-and-confer process, which
4 would enable us to do that. And we've done it successfully
5 with every other third party in this case so far. We're not
6 looking to impose burden or get documents that we don't want
7 to review either.

8 Now, Mr. Gibbs, a lot of his argument was centered
9 on the fact that, listen, he thinks the documents show
10 CenturyLink's innocence. Well, Your Honor, that just goes
11 to show their relevance, right? If Mr. Gibbs thinks -- his
12 primary argument, as you said, on reply was, look, these
13 documents are only going to show that we are the good guys
14 here. Listen, we dispute that. We believe the documents do
15 not remotely show that. But that only shows their
16 relevance. And it doesn't speak at all to the fact that
17 they might be outside of the scope of discovery in this
18 case. It shows the opposite.

19 THE COURT: I want to talk a little bit about
20 Document Request No. 4 for the ten bill collector subpoenas
21 and that's the questions about the talking points. It seems
22 like those talking points could only have come from
23 CenturyLink. They could only have been generated by
24 CenturyLink because only CenturyLink has the knowledge about
25 things like the lawsuit that's being inquired about and the

1 cramming talking points. Those aren't things that the bill
2 collectors themselves would generate, the *Heiser* lawsuit,
3 the Arizona AG action.

4 How is that not redundant of what you're already
5 going to receive from CenturyLink? Because presumably
6 you've already sought -- in fact, Mr. Gibbs shows in his
7 submission that they've already provided a great deal of
8 documentation from searching for those exact sorts of terms.
9 So why do we need to ask the bill collectors about that?

10 MR. BLATCHLEY: Well, Your Honor, the one thing
11 that we've seen in the documents so far is that we see third
12 parties, like the call center vendors, and I believe the
13 same is true of some of the collection agencies, reaching
14 out and asking CenturyLink what they should be doing and
15 what they should be saying.

16 So the internal -- the concerns are not just
17 coming -- the communications and the discovery there is not
18 just CenturyLink here are the talking points, but also what
19 these other kind of third parties are doing in response to
20 these developments and how they're internally discussing how
21 that impacts their business and how it justifies what
22 they've seen for the past couple of years or not.

23 THE COURT: That seems pretty much a stretch. I
24 mean, their communications to CenturyLink saying, hey, how
25 should we answer -- how should we talk about the Minnesota

1 AG action, those are going to be captured in documents
2 provided by CenturyLink, right?

3 MR. BLATCHLEY: Your Honor, so the direct
4 communications would be captured in the search that
5 CenturyLink has performed.

6 Your Honor, I do want to say just on this point we
7 have strong disagreements, and I'm sure you will see us
8 before Your Honor again, about the sufficiency and the
9 quality of those searches. Again, Mr. Gibbs, I think,
10 oversteps tremendously when he says -- when he talks about
11 the robustness and the comprehensiveness of the search that
12 they performed. That is simply not the case. I don't want
13 to rehash it here, Your Honor.

14 But we're talking about a very limited number of
15 custodians in a case that is of significant national scope
16 and what we're talking about here is, you know, we had a
17 total of 50 custodians. They destroyed the files of five of
18 them. We had 20 of those custodians who are going to be
19 former employees that we ourselves, plaintiffs, had cited in
20 the Complaint. Seven of them are of the executive
21 defendants. That leaves a bucket of about, you know, 20 to
22 30 custodians that are unique individuals at a company whose
23 business operations were very large, national in scope.

24 We're talking about all kinds of, you know,
25 different parts of the company, from accounting, to bill

1 collections, to call centers, to marketing. It is a
2 significant scope of a case. It requires a significant
3 amount of discovery and the third-party subpoenas that we
4 issued are seeking just routine, ordinary third-party
5 discovery in a case like this. Now --

6 THE COURT: Okay. I want to talk a little bit
7 about how routine and ordinary this third-party discovery
8 is. Like let's talk about the language in the bill
9 collector subpoena. You're asking for language -- let me
10 just get to it. All documents about any master agreement or
11 forward flow agreement or any contract or agreements between
12 them and CenturyLink and all documents describing the work
13 you performed and the results you obtained, that feels
14 wildly broadly disconnected to trying to get at customers
15 complaining about cramming.

16 MR. BLATCHLEY: So, Your Honor, let me just
17 explain that because I think that might have been unclear.
18 And, again, the process that normally takes place, we issue
19 a subpoena --

20 THE COURT: I understand your position is that you
21 should be able to ask for the universe and then engage in
22 some sort of negotiation with the third party that gets to
23 what you're actually asking for, but you're still on the
24 face extremely broad.

25 MR. BLATCHLEY: So, Your Honor -- and we don't

1 mean to be and that's what the meet and confer is for, Your
2 Honor, in every case. They will say I don't know what
3 you're talking about. Let's limit it to this. Can we
4 narrow it to that? And that process takes place. It's
5 taken place with all the other third parties in this case so
6 far. It takes place every day with every subpoena that's
7 issued across the country.

8 Here that request is specifically relevant to the
9 allegations that we have that CenturyLink was
10 misrepresenting to investors the reasons why its revenues
11 were fluctuating with respect to the creditworthiness of
12 their customers. That is something that the company said,
13 well, the revenue has declined a little bit because we are
14 trying to focus on higher creditworthy customers. And it
15 also showed that revenues are declining because we have
16 customers who are not paying their bills.

17 And, again, the discovery from the collection
18 agencies is going to show, or not, that those
19 representations were not true because what was, in fact,
20 happening, is our allegation, is that people were being sent
21 to collections and not paying their bills because they were
22 being improperly charged.

23 And, again, the late termination fee, the late
24 fee -- I'm sorry, the termination fee, a fee that's only
25 assessed when you're leaving the company, that is only going

1 to show up in a dispute with the collection agencies in the
2 vast majority of cases because, again, like the documents
3 show, some of those calls are going straight to the
4 collection agencies themselves when you call in to complain
5 about your bills.

6 THE COURT: But there's no reason -- aside from
7 your 10 to 20 percent of calls answered by a collection
8 agency allegation, there's no reason that -- if I closed out
9 my relationship with CenturyLink and got my final bill and
10 it had some random penalty for closing out my relationship,
11 I would call CenturyLink, right? I mean, there's no reason
12 that it would automatically get kicked to collections.
13 Let's say it's not overdue.

14 MR. BLATCHLEY: Your Honor, I think what we're
15 talking about here again, I think your hypothetical is that,
16 it's a hypothetical. We have an opportunity to have those
17 discussions with the third parties themselves. I think that
18 what we should be doing is talking about concrete facts
19 about what kind of documents that they have, what is their
20 process, do they have -- how does it work.

21 We don't have some of the basic information that
22 gets to the kind of process question that I think you are
23 asking when you are saying I don't -- I wasn't charged
24 for -- I'm a customer. I think I'm speaking to CenturyLink.
25 And if that's not the case, I'm talking to a third-party

1 collection agency, then your example doesn't work.

2 If I'm -- again, if I'm getting, you know, hounded
3 by a collection agency for something that I feel I
4 improperly owe, I have to deal with the collection agency
5 first. Those are going to be unique communications with the
6 collection agency.

7 Your Honor, defendants made a big deal in their
8 motion to dismiss about how plaintiffs had not quantified
9 the impact of this cramming. That is a centerpiece of their
10 defense in this case. What they are trying to do with this
11 motion and with all party discovery, in fact, is trying to
12 limit our ability to quantify that misconduct.

13 And to say that it's somehow not relevant is just
14 simply untrue. We are entitled to that discovery. It is
15 routine, ordinary discovery. And to the extent that there
16 are questions about duplication, we are going to talk about
17 that with the third parties and avoid that burden.

18 THE COURT: Let me ask you about Request No. 2,
19 all documents concerning disputed collections. So
20 presumably that is all records of all conversations with all
21 people from whom they are trying to collect debts about, oh,
22 my deadbeat uncle opened that account under my Social
23 Security number, right? All documents --

24 MR. BLATCHLEY: Your Honor --

25 (Simultaneous indiscernible crosstalk)

1 THE COURT: That's where you would see the
2 complaints, right, it's Request No. 2?

3 MR. BLATCHLEY: Yes, Your Honor. But, Your Honor,
4 again, what we are trying to do is making sure we're asking
5 a question that will get us the answer we want, and to do
6 that you have to go through the meet-and-confer process so
7 that we can --

8 THE COURT: You keep defending the idea that you
9 can serve a subpoena with very few limits and then tidy it
10 up on the back end, and that might be how things go, but
11 what I'm asked to look at in this motion to quash are the
12 four corners of this subpoena and, read literally, Request
13 No. 2 asks for all documents concerning disputed
14 collections --

15 MR. BLATCHLEY: Your Honor --

16 THE COURT: -- and billing issues. That's like
17 all the documents.

18 MR. BLATCHLEY: Your Honor, clearly we don't want
19 all the documents. Clearly the subpoena should be read as I
20 think, Your Honor, Request No. 2 actually reads, to reflect
21 requests about what we call cramming and billing issues.

22 Again, cramming is in this case. And I'm just
23 trying to explain the reason for the language that you're
24 seeing. We have a series of problems where customers were
25 misquoted, and we have also -- and that means a different

1 price than they thought they were going to --

2 THE COURT: I understand the heart of your case.
3 Yeah, I get it. I understand how your case works. I
4 understand what you are claiming happened. I understand the
5 nature of the Complaint. It is contemplated by cramming and
6 billing issues, or at least by the word "cramming" and
7 perhaps by sales and billing practices.

8 But when we talk about -- I mean, one of my
9 concerns, and I'm not hiding my cards, is that these
10 subpoenas, even if there are key nuggets of relevant
11 information here, are really, really broad.

12 MR. BLATCHLEY: Your Honor, and again I think the
13 way we address those concerns is through the meet-and-confer
14 process. You know, I appreciate Your Honor is looking at
15 the subpoena as written. I promise you that when we get on
16 the phone calls with these third parties, they tell us,
17 listen, I can tell you who the relevant folks are. Here's
18 what we are willing to do. Here's how the process actually
19 worked.

20 We haven't had the opportunity to have those
21 conversations to come back to you with actual facts about
22 here is what the actual request comes down to and here's
23 what the response and the potential universe of documents
24 looks like. We just haven't had that opportunity.

25 THE COURT: I have two more questions for you on

1 this one and then I have one question for you on the other
2 one, "this one" being the bill collector subpoena, "the
3 other one" being the Great Place to Work subpoena.

4 So tell me both why you are seeking information
5 about a time frame that is broader than the time frame that
6 we have at issue in the lawsuit and tell me why Request
7 No. 4 is remotely relevant and, frankly, not just an effort
8 to kind of backdoor my earlier rulings about cloned
9 discovery.

10 MR. BLATCHLEY: So, Your Honor, again on the time
11 period, I think we answered that question for Your Honor in
12 the brief. Again, it's -- it was our anticipation in
13 putting forth the time period that we would negotiate the
14 appropriate time period as to each collection agency.
15 That's what attorneys do when we get on the meet-and-confer
16 phone calls. As I think we mention in the brief, we would
17 be happy to shorten the time period.

18 On the motion today, we do know that certain of
19 the third-party collection agencies were responsible for
20 certain time periods and they ended their relationships at
21 other time periods.

22 We don't want documents that don't exist and we
23 don't want to create an undue burden by having an overly
24 long time period, but, again, the questions about what the
25 appropriate time period is, we're concerned when we are

1 sending out a subpoena that we are not asking for the right
2 universe, but we will get to a smaller universe, the
3 appropriate universe, in the meet-and-confer process.

4 Your Honor, on Request No. 4, that was actually
5 driven by the answers that we got back from some of the
6 third-party call center subpoena recipients who had been
7 previously subpoenaed by the Minnesota Attorney General. We
8 got the answer from them that said, and this goes to the
9 burden argument, we don't want to review this. Will you
10 just take the Attorney General's production? We've already
11 done this once. We thought that that was a way to ease the
12 production burden on them. We thought that that would,
13 again, be a helpful way to streamline it, so we put it as a
14 request in the subpoena. That's the idea there.

15 Again, it's our intent to not burden third
16 parties. It's not our intent to burden plaintiffs, which
17 are working, you know, on a basis where we don't want a
18 large universe of documents, we want the right documents to
19 review.

20 THE COURT: So you're saying that for the
21 third-party bill collectors you would -- instead of
22 everything else, you would accept just what they produced to
23 the AG?

24 MR. BLATCHLEY: No, Your Honor. What we said is
25 that has been a category of documents that we have found

1 that other third parties, the call center third parties,
2 gladly provided to us and we've supplemented the discovery
3 on those third parties in some instances where sometimes
4 that's been sufficient. And so that's what the request was
5 intended to accomplish and again --

6 THE COURT: Okay.

7 MR. BLATCHLEY: Again, the idea there, and I don't
8 want Your Honor to get the misimpression, the idea there is
9 to eliminate, reduce, alleviate burden because they've
10 already done the work and not to in any way --

11 THE COURT: It feels like it eliminates and
12 alleviates burden if you agree that's all you'll ask for,
13 but if that is just one of several things, then it does the
14 exact thing that I expressed concerns about in the first
15 place.

16 MR. BLATCHLEY: Your Honor, and that's right, but
17 we found that the third parties in many instances were able
18 to say, listen, we've already done this. We would be happy
19 to have you take this and then we can talk about whatever
20 else you might need. It's just a way to streamline things.

21 THE COURT: Let's look at the Great Place to Work
22 subpoena. So that's what you're referring to with Request
23 No. 4. What is your reason to think that Great Place to
24 Work has information that they didn't provide to
25 CenturyLink?

1 MR. BLATCHLEY: Your Honor, again, that's a
2 question we would like Great Place to Work's answer on. And
3 if the answer is we have nothing, then I don't think -- we
4 don't have much farther to go.

5 The problem is when we -- you know, we served the
6 subpoena and we got a motion from defendants saying we want
7 to shut it down without letting us talk to the third party.
8 Mr. Gibbs, I think your question to him showed that he
9 didn't know the answer as to whether they have unique
10 internal documents.

11 We've found in many cases that I prosecuted, Your
12 Honor, that the third parties themselves have very valuable
13 discussions that go to, you know, in this case it would be
14 the falsity of defendants' representations about their
15 cramming, the culture inside the company. That --

16 THE COURT: But presumably --

17 (Simultaneous indiscernible crosstalk)

18 THE COURT: -- there's no universe in which they
19 wouldn't share that. Like what possible value do they have
20 sitting on this information? This information is valuable
21 to the defendants. The information is arguably valuable to
22 their ratings. But there's no logical reason they wouldn't
23 have provided it to the defendants, right? They are not
24 doing secret work on behalf of some other third party.

25 MR. BLATCHLEY: No, Your Honor, but I think what's

1 missing there is that they have an experience doing this for
2 companies all across the country and to the extent that they
3 have a viewpoint about how CenturyLink has done things, that
4 they want to make sure they -- when they discuss that
5 internally, when they do the summaries, when they put those
6 together, and they have the conversations about how they
7 want to more carefully message what the results of those
8 surveys are to the company, that's certainly valuable
9 information that's relevant to this case.

10 THE COURT: But they provided raw data, right,
11 they provided the raw responses to CenturyLink?

12 MR. BLATCHLEY: Again, Your Honor, we don't have a
13 very good understanding of what exactly was provided and
14 what was not, and that is what the conversations with the
15 third parties are supposed to get at and they can tell us
16 that; and if they do, then I think we're done there. But
17 the problem is we haven't had that opportunity to have that
18 routine, everyday meet-and-confer process. And we have
19 strong reasons to believe --

20 THE COURT: So can I ask you a question about
21 that?

22 MR. BLATCHLEY: Yep.

23 THE COURT: Why haven't you had the routine,
24 everyday meet and confer? I mean, Mr. Gibbs isn't king and
25 he can't tell them -- can you all hear me? I just got that

1 little alert that my Internet is wiggling. Can you all still
2 hear me and see me?

3 MR. GIBBS: We can hear you, Your Honor.

4 THE COURT: Good. Sorry about that.

5 Did somehow the defendants stop you from talking
6 to these third parties to identify the volume of documents
7 in the universe?

8 MR. BLATCHLEY: Your Honor, I think what happened
9 is that the defendants reached out to the third parties and
10 said that they were filing this motion, that they didn't
11 have to respond to our subpoena. Because of that motion, I
12 don't want to -- they have had that correspondence and so
13 what the third parties have told us is let's wait and hear
14 what Judge Menendez has to say before we engage in those
15 discussions.

16 THE COURT: All of them?

17 MR. BLATCHLEY: Your Honor, I believe that so far
18 that is true. We've had one discussion that is further
19 along about potentially responding, but for the most part,
20 Your Honor, they've served responses and objections. And,
21 again, it's like the responses and objections we received
22 from every third party in this case and, you know, we wanted
23 to go out and have that process done, but, again, we didn't
24 want to overstep anything that Your Honor might provide.

25 THE COURT: So when you say they served responses

1 and objections, what did Great Place to Work say?

2 MR. BLATCHLEY: Your Honor, I'm not positive on
3 that. I actually might have to check with one of my
4 colleagues, what they said, but I haven't seen -- again, I
5 haven't had a discussion with them to see what, you know,
6 internal third party -- internal documents they might have
7 that are unique and not provided to CenturyLink.

8 THE COURT: Okay. Thank you. This has been super
9 helpful.

10 Mr. Gibbs, I'll give you the last word, a few
11 minutes, if you would, to respond to Mr. Blatchley's points.

12 MR. GIBBS: Thank you, Your Honor. Just briefly.

13 I think we have a fundamental disagreement with
14 plaintiffs about how the third-party subpoena process is
15 supposed to work. The rules affirmatively require counsel
16 to avoid undue burden on third parties.

17 And this subpoena is not just a document request
18 served by a party. The subpoena comes under the court's
19 name and lawyers are given the legal ability to use the
20 court's power to compel third parties, who have nothing to
21 do with this case, to produce documents. That's why they
22 have an affirmative obligation to draft them in a way that
23 is reasonable and that avoids undue burden.

24 And it does not suffice to use the court's power
25 to serve an incredibly broad, facially duplicative subpoena

1 and just say don't worry, Judge, I'm going to be reasonable
2 when we get on the phone. They have an obligation to be
3 reasonable in the subpoena as drafted and as served on a
4 third party. They've made no effort to do that here.

5 As to the meet-and-confer process, Your Honor is
6 exactly right. I don't get to tell these people what to do.
7 If they are inclined to continue meeting and conferring,
8 they are entitled to do that. But they are also entitled to
9 know that we plan to file a motion for a protective order,
10 which we did in good faith because we believe this was well
11 beyond reasonable discovery. We believe that enough is
12 enough.

13 If there's a case there to be proven, they should
14 have it by now and so we decided to move for a protective
15 order because it seemed to us that based on the way in which
16 relevance has been discussed so far, these are well beyond
17 that reasonableness line.

18 THE COURT: Okay. All right. Thank you both very
19 much for a really helpful argument. I'm going to try to get
20 an order out on this as soon as we can. I really appreciate
21 you answering all of my questions and taking time to talk to
22 me today.

23 And thanks for participating remotely. I know
24 this is a strange way for us to conduct business, but I
25 actually found it really helpful to see you both instead of

1 just having a phone hearing, which I know we've also done in
2 the past. So unless I hear an objection, I think for the
3 near future we're going to stick with Zoom over phone
4 hearings for substantive hearings like this. To the extent
5 the informal process gets invoked, we'll continue to do
6 those by phone.

7 Can we tend to one housekeeping matter before I
8 let you go, and that's this. We have a telephonic status
9 conference set for next week, if I'm recalling correctly.
10 Let me pull up the date. I have us on the 25th of August.
11 I am -- I think we should get together and talk. I suspect
12 there are things to discuss besides just this. Does anybody
13 disagree?

14 MR. BLATCHLEY: No, Your Honor.

15 MR. GIBBS: No, Your Honor. That's fine with us.

16 THE COURT: Okay. If there's anything in
17 particular that you would like to have on the agenda or that
18 you would like to prepare me for in advance, if you could
19 get an e-mail to chambers, cc'ing opposing counsel of
20 course, by 5:00 on Monday. If it's going to be a big
21 pitched battle, the sooner the better. But if it's just
22 flagging a issue or two so that I'll know what we'll be
23 discussing, that would be really appreciated.

24 And I recognize that I might not have the right
25 two of you on the hot seats for the conversation about what

1 we might need to talk about next week, so please consult
2 with your colleagues and let them know as well that if they
3 want me to think about anything or if you all want to
4 propose a particular agenda, do that by close of business on
5 Monday, the 24th.

6 Okay. All right. Thanks. I hope everybody is
7 staying healthy and well during all of this uncertainty, and
8 I appreciate your time today.

9 MR. GIBBS: Thank you, Your Honor.

10 MR. BLATCHLEY: Thank you, Your Honor.

11 THE COURT: Okay. Thank you.

12 (Court adjourned at 10:00 a.m.)

13 * * *

14
15
16 I, Lori A. Simpson, certify that the foregoing is a
17 correct transcript from the record of proceedings in the
18 above-entitled matter.

19
20 Certified by: s/ Lori A. Simpson

21 Lori A. Simpson, RMR-CRR
22
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25